

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALBERT G.,)	2 CA-JV 2011-0021
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
KRISTY R., ALBERT G., JR., and)	Appellate Procedure
MERCEDES G.,)	
)	
Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100SV200900077

Honorable Joseph R. Georgini, Judge

Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

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By Thomas M. Larson

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Florence
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Appellees Albert G., Jr. and Mercedes G.

ECKERSTROM, Judge.

¶1 Albert G. appeals from the juvenile court's February 2011 order terminating his parental rights to his son Albert G., Jr., born in 1999, and daughter Mercedes G., born in 2001. The court ordered termination on the grounds of abandonment, *see* A.R.S. § 8-533(B)(1), as alleged in a petition filed by the children's mother, Kristy R. Albert argues the evidence was insufficient to support this ground for termination or the court's finding that termination was in the children's best interests.¹

¶2 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in § 8-533(B) and "shall also consider the best interests of the child." *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve a child's best interests. *See* §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 42, 110 P.3d 1013, 1022 (2005). On appeal, we view the evidence in the light most favorable to sustaining the court's ruling, and we will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¶3 Albert does not dispute that he has been incarcerated for felony convictions for most of his children's lives and will remain in prison until 2014. He also acknowledges evidence at the hearing that, when the children were left in his care as toddlers, he had left them unattended and unsupervised and had stolen items from them and from Kristy; that he had visited the children after he was released from prison in May

¹Although Albert also challenges the sufficiency of the evidence to support a finding that termination was warranted based on the length of his incarceration pursuant to a felony conviction, *see* § 8-533(B)(4), the juvenile court's order does not cite this ground as a basis for its decision.

2007, but last saw them in February or March 2008; that he has had no contact with the children since his current incarceration began in December 2008; and that he has provided a mere \$708 in child support over the children's lifetime.

¶4 Although Albert cites his own testimony that Kristy or others had thwarted his attempts to contact the children from prison and disputes the court's finding that this testimony was not credible, his argument does not support a claim of insufficient evidence. The juvenile court is in the best position to determine the credibility of witnesses, and we will not re-weigh the evidence. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶¶ 4, 14, 100 P.3d 943, 945, 947 (App. 2004).

¶5 Albert also argues "no clear and convincing evidence was marshaled to show intentional conduct . . . evincing a settled purpose to forgo all parental duties" or his conscious disregard of those duties "during his present period of incarceration." Although those legal standards were employed before the legislature revised the definition of abandonment in 1994, our supreme court has since rejected both common law tests "in favor of the statutory definition."² *Michael J. v. Ariz. Dep't. of Econ. Sec.*, 196 Ariz. 246, ¶¶ 16-19, 995 P.2d 682, 685-86 (2000); *see also In re Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 95-97, 876 P.2d 1121, 1130-32 (1994) (first rejecting settled purpose and conscious disregard tests for termination proceedings against unwed father with no parental relationship); *Kenneth B. v. Tina B.*, 226 Ariz. 33, ¶¶ 15-16, 243 P.3d 636, 639 (App. 2010) (recognizing change in law). Now, the proper

²“‘Abandonment’ means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.” A.R.S. § 8-531(1).

inquiry is “whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship.” *Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86.

¶6 Incarceration alone neither justifies a determination of abandonment nor provides a defense to it. *Id.* ¶¶ 21-22. Instead, an incarcerated parent—like any other—must make more than minimal efforts to support his children. *Id.* ¶¶ 18, 21. Ample evidence supported the juvenile court’s conclusion that Albert had failed to do so. Indeed, as the children suggest in their answering brief, Albert’s failure to see them from March to December 2008, while he was out of custody, is prima facie evidence of abandonment. *See* § 8-531(1).

¶7 Albert also argues that Kristy failed to present evidence that the children would benefit from termination of his parental rights or that a failure to terminate his rights would be detrimental to them. *See Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d at 945 (best interests finding in support of termination requires showing that children “would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship”). To the contrary, Kristy testified her husband, Robert R., has been involved in the children’s lives since 2003, and the children regard him as their father and have asked why they cannot share his surname. *See Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 14, 53 P.3d 203, 207 (App. 2002) (to determine best interests, court may consider “whether an existing placement is meeting the needs of the child”), *quoting Audra T. v. Ariz. Dep’t of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998).

¶8 Kristy also stated she did not feel the children would be safe in Albert’s care, because Albert did not seem to understand his parental obligation to protect and guide them. Although she acknowledged that Albert had safely returned the children to her after his visits with them in 2007 and early 2008, she added that those visits had been limited to a matter of hours. She also had been troubled by some of the things the children reported after their visits, such as Albert’s “rolling something to smoke” and allowing them to ride in a car without wearing seatbelts. She testified that Albert Jr., then seven, had reported “dirty sex jokes” his father had shared with him and had suffered some disturbances in school after the visits. Kristy further reported that Mercedes had never bonded with Albert, and her step-father, Robert, was the only father she had ever known. The evidence was more than sufficient for the juvenile court to determine, by a preponderance of the evidence, that termination was in the children’s best interests.

¶9 Substantial evidence thus supported the court’s order terminating Albert’s parental rights to Albert Jr. and Mercedes. Accordingly, we affirm that order.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge